Supreme Court, U. S.
FILED
JUL 12 1976
MICHAEL RODAK, JR., CLERK

No. 76-26

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

James Sanford Burnette, Petitioner,

vs.

State of Tennessee, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States

Robert E. Lillard,
Counsel for Petitioner,
Stahlman Building
Nashville, Tn. 37201

Patrick J. Kennedy,
Counsel of Record,
Address of 204 Public Square, North
Nashville, Tn. 37201

James S. Patrick,
Counsel of Record,
Address of 204 Public Square, North
Nashville, Tn. 37201

INDEX

Page

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statute Involved 2

Statement 3

Reasons for Granting This Writ 9

Conclusion 10

Certificate of Service 11

Appendix A:

Petitioner's Petition for Writ of Habeas Corpus . . . App. 1

Order of the Criminal Court of Madison County, Tennessee entered July 3, 1975 . . . . . App. 3

Opinion of the Court of Criminal Appeals of Tennessee, filed March 10, 1976 . . . . . App. 5

Opinion of the Supreme Court of Tennessee at Jackson, filed April 26, 1976 . . . . . App. 9

Notice of Appeal filed May 27, 1976 . . . . . App. 10

Certificate of Service for Notice of Appeal . . . . . App. 11

Affidavit of Attorney filing Notice of Appeal . . . . . App. 12

CONSTITUTIONAL PROVISIONS

Page

Fourteenth Article of Amendment to the Constitution of the United States 2

STATUTES

Title 28 United States Code S 257 (3).....1

TABLE OF CASES

Page

Albori v. United States,
(C.C.A.9) 67 F2d 4, 6 (1933).....8

Bachalter v. People of the State of New York,
319 U.S. 427, 63 S. Ct. 1129 (1943).....6

Foster v. People of the State of Illinois,
332 U.S. 134, 67 S. Ct. 1716 (1947).....6

In re Jennings,
(C.C.) 188 F. 479, 481 (1902) 8

Shields v. Beto,
5 Cir., 370 F2d 1003 (1967).....7

Smith v. Swope,
9th Cir., 91 F2d 260 (1937) 7

Thompson v. Bannan,
6 Cir., 298 F2d 611 (1962).....7

White v. Pearlman,
(C.C.A.10) 42F2d 788, 789 (1930).....8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. ____

James Sanford Burnette, Petitioner

vs.

State of Tennessee, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNTED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

James Sanford Burnette, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Tennessee entered in the above-entitled case on April 26, 1976.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Tennessee is unreported and is printed in Appendix A hereto, infra, page App. 7. The opinion of the Court of Criminal Appeals of the State of Tennessee is unreported and is printed in Appendix A hereto, infra, page App. 4. The judgment of the Criminal Court of Madison County, Tennessee is printed in Appendix A hereto, infra, page App. 3.

JURISDICTION

The Judgment of the Supreme Court of the State of Tennessee was entered on April 26, 1976. The jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code. This statute applies to the case at hand because the Petitioner attempted in invoke his right to due process of law as guaranteed by the Fourth Amendment to the Constitution of the United States, in the Courts of the

State of Tennessee, but his attempt to assert this right was disregarded and ignored by the Courts of the State of Tennessee from whose decision this Petition is sought.

QUESTIONS PRESENTED

Must a state court, considering a Habeas Corpus Petition, pursuant to an extradition hearing, entertain Federal Constitutional questions raised by the Habeas Corpus Petition, when the questions raised by the Petition do not challenge the validity or propriety of a decision or judgment rendered by a Court of another state but rather challenge the propriety and constitutionality of the ministerial acts of an official acting in and for another state in enforcing a decision or decree of the said other state.

STATUTE INVOLVED

The constitutional provision involved in this Petition is Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and it reads as follows:

ARTICLE XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Requisite to a proper understanding of this case is a reference to the following sequence of events:

DATES	DESCRIPTIVE EVENTS
April 12, 1971	A warrant is issued for the Petitioner by the State of Alabama pursuant to a charge that Petitioner has obtained money under false pretenses;
December 4, 1971	Petitioner is arrested by the State of Alabama;
February 14, 1972	Petitioner is arraigned in the State of Alabama;
August 15, 1972	Petitioner is tried by the State of Alabama;
August 16, 1972	Petitioner is convicted in the State of Alabama;
August 21, 1972	Petitioner is sentenced to ten years in prison in the State of Alabama;
August 24, 1972	Petitioner appeals his conviction of August 16, 1972 and is released on bond;
November 17, 1972	Petitioner is arrested by agents of the United States Government in Knoxville, Tennessee on federal charges,
December 12, 1972	Petitioner is tried in the United States District Court at Knoxville, Tennessee;
December 29, 1972	Petitioner is sentenced by the United States District Court at Knoxville, Tennessee and he is ordered held without bond in Knox County Jail until such time as he may be transferred to the Federal Penitentiary in Terre Haute, Indiana;

January 3, 1973	Petitioner files a timely of appeal his Federal conviction of December 12, 1972;
August 7, 1973	Petitioner is transferred from the Knox County Jail, Knoxville, Tennessee, to the Federal Penitentiary in Terre Haute, Indiana;
September 14, 1973	Court of Appeals for the State of Alabama affirms Petitioners conviction of August 16, 1972 and thus renders Petitioner Alabama sentence final;
September 30, 1973	State of Alabama lodges a detainer with the authorities at the Federal Penitentiary at Terre Haute, Indiana;
September 30, 1973	Petitioner directs a letter to the State of Alabama requesting that they obtain custody of himself so that he (the Petitioner) might begin to serve his sentence in the State of Alabama; no answer;
October 15, 1973 (Circa)	Petitioner again writes State of Alabama requesting that he be taken into custody to begin serving his sentence; no answer;
November 1, 1973 (Circa)	Petitioner again writes the State Alabama requesting that he be taken into custody so that he might begin serving his sentence; no answer;
January 30, 1974 (Circa)	Petitioner files Writ of Corum Nobis in the Alabama State Court; no answer;
February 1974 (Circa)	Petitioner files Writ of Mandamus in the Alabama State Courts;
March 3, 1974	Petitioners Writ of Mandamus denied without a hearing;
September 5, 1974	Defendant files Writ of Habeas Corpus in the Alabama Courts;

October 20, 1974	Petitioner Writ of Habeas Corpus is denied without a hearing;
October 22, 1974	Petitioner files Notice of Appeal from denial of his Alabama Habeas Corpus Petition;
March 1, 1975	Petitioners appeal from the denial of his Habeas Corpus Petition is denied without a hearing;
February 18, 1975	Petitioner is released from the Federal Penitentiary in Terre Haute, Indiana and is delivered to the custody of the State of Tennessee;
April 1975	Petitioners petition for Writ of Certiorari to the United States Supreme Court on Appeal from his Federal Conviction of December 12, 1972, is denied; thus, Petitioners Federal sentence becomes final;
March 12, 1975	State of Alabama executes Governor's Warrant for Petitioners and forwards the same to the State of Tennessee;
April 16, 1975	Governor of Tennessee issues an Arrest Warrant for Petitioner;
May 2, 1975	Petitioner is brought before Criminal Court of Madison County, Tennessee for a hearing on the Tennessee Governor's Warrant of April 16, 1975; a hearing is held and defendant is given time to obtain counsel;
July 2, 1975	Petitioner is again brought before the Circuit Court of Madison County, Tennessee and files his Writ of Habeas Corpus objecting to the Jurisdiction of the State of Alabama to claim him.

From the above chronology, one can readily see that a final sentence was imposed upon the Petitioner by the State of Alabama on the 14th day of September, 1973 but the State of Alabama did not attempt to enforce this sentence until the 12th day of March, 1975 when they obtained a Governor's Warrant for the Petitioner. This constitutes a delay of over one and one-half years. This delay in and of itself would perhaps not be fatal to Alabama's later assertion of jurisdiction over the Petitioner but, when this delay is viewed in light of the fact that the Petitioner was, during this time, detained in a federal penal institution and his Federal Sentence was not final and the State of Alabama could have easily and properly obtained custody of the Petitioner at any time, one can not fail to see a malicious, willful and wantant disregard for the Petitioner's rights to the due process of law guaranteed him by the Fourteenth Amendment to the United States Constitution.

Petitioner feels that the State of Alabama, having a final judgment and sentence against him had a duty to do all within its power to obtain custody of the Petitioner. This is especially true since the Petitioner was in a federal penal institution but his Federal sentence was not final. Further, authorities of the State of Alabama could have readily obtained custody of the Petitioner by simply requesting his transfer to the State of Alabama.

Petitioner here makes no quarrel with the decision of the Courts of the State of Alabama but he does strongly object to the gross neglect, delay, and indolence of officials of the State of Alabama in carrying forth the sentence ordered by the Courts of the State of Alabama.

The Fourteenth Amendment requires that action by a state through its agencies must be consistent with the fundamental principles of liberty and justice, Bachalter v. People of the State of New York, 319 U.S. 427. It exacts from the States a concept of fundamental justice, Foster v. People of the State of Illinois, 332 U.S. 134.

To allow the State of Alabama to take custody of the Petitioner at this time would be to allow them to act inconsistently with the fundamental principles of liberty and justice guaranteed by the Constitution of the United States and administered by this Court.

Circuit Court Decisions have ruled that states, cannot reassert their jurisdiction after relinquishing the same. In Shields v. Beto, 5 Cir., 370 F2d. 1003, the Court considered this question and ruled that the State attempting to reassert jurisdiction and obtain custody of a defendant had waived its jurisdiction by prior inaction. In Thompson v. Bannan, 6 Cir., 298 F2d 611, the Court entertained a pardon theory.

In Smith v. Swope, 9th Cir., 91 F2d 260, the Circuit Court of Appeals considered a fact situation similar to the one presently before the Court. The Court in Smith states the part:

"The question thus presented is a very simple one: When a defendant is sentenced to prison and the marshal having him in custody is ordered to deliver him to the prison 'forthwith' and fails to do so until five years later, is the prisoner's service of his sentence deemed to begin at the time of his sentence and the commitment and custody thereunder by the marshal, or at the date of the tardy actual commitment to prison?

To state the question is to answer it. The least to which a prisoner is entitled is the execution of the sentence of the court to whose judgment he is duly subject. If a ministerial officer, such as a marshal, charged with the duty to execute the court's orders, fails to carry out such orders, that failure cannot be charged up against the prisoner. The prisoner is entitled to serve his time promptly if such is the judgment imposed, and he must be deemed to be serving it from the date he is ordered to serve it and is in the custody of the marshal under the commitment, if, without his fault, the marshal neglects to place him in the proper custody. Any other

holding would give the marshal, a ministerial officer, power more arbitrary and carpricious than any known in the law. A prisoner sentenced for one year might thus be required to wait forty under the shadow of his unserved sentence before it pleases the marshal to incarcerate him. Such authority is not even granted to courts of justice, let alone their ministerial officers. Citation of authority if hardly needed to establish so elementary a proposition. In re Jennings (C.C.) 118 F. 479,481; Albori v. United States (C.C.A.9) 67F. (2d) 4,6. And see White v. Pearlman (C.C.A.10) 42 F. (2d) 788,789."

In the case at hand, the Courts of the State of Tennessee have refused to do so much as consider Petitioners Federal Constitutional question as raised in his Writ of Habeas Corpus. This denial of a hearing on the subject of Petitioners right to object to a Constitutional violation in a State Court expedition proceeding is, in and of itself, a violation of the Petitioner's Fourteenth Amendment rights. The Fourteenth Amendment was designed to protect the right of persons seeking access to the Courts for consideration of claims concerning incarceration. To say that the Petitioner in this case must wait until he is incarcerated by the State of Alabama to object to his incarceration is to refute the basic principles underlying the Fourteenth Amendment. Petitioner must be afforded a fair and full evidentiary hearing on his Writ of Habeas Corpus and this hearing must be had prior to his incarceration if the Constitutional mandates of the Fourteenth Amendment are to be adhered to. To fail to give the Petitioner a hearing prior to incarceration would cause him much irrepairable injuries and harm. It would so completely obviate his access to the Courts so as to effectively preclude his assertion of his Constitutional Rights as guaranteed by the Fourteenth Amendment.

This Court must afford Petitioner a hearing or, in the alternative, remand his case to the Courts of the State of Tennessee for a hearing on the Petitioner's Habeas Corpus Petition and this must be done prior to the time that the Petition is surrendered to the authorities of the State of Alabama.

REASONS FOR GRANTING THIS WRIT

This Writ must be granted for the following reasons:

ONE

There are substantial Federal questions raised by the Petitioner's circumstances, his Petition for Writ of Habeas Corpus and this Petition.

TWO

The Courts of the State of Tennessee have refused to grant the Petitioner a hearing on the Federal questioned raised by his Writ of Habeas Corpus.

THREE

The Petitioner will suffer irrepairable harm and injury if this Petition is not granted, in that he will be forced into a penitentiary in the State of Alabama and will thus be effectively denied access to this or any other court.

FOUR

In this case, this Court is asked to command a Court of the State of Tennessee to consider Constitutional issues properly raised in that Court and bearing on the propriety of ministerial actions of officials of a sister state. This request, by its very nature, raises questions of comity and judicial propriety in our system of federalism and these questions must be considered. But, no matter how important or consequential these considerations of comity or federalism may be, they cannot be elevated above the Constitutional Rights of an individual as guaranteed and protected by the Constitution of the United States and this Court. The Courts of Tennessee had a duty and have a duty to decide the Petitioner's Federal Constitutional questions prior to his imprisonment by the State of Alabama.

This Court should entertain the Petitioner's Constitutional questions and afford the Petitioner a hearing on the merits or in the alternative should remand the case to the Courts of the State of Tennessee for a comprehensive hearing and consideration of the law.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert E. Lillard

Counsel for Petitioner

Patrick J. Kennedy,
Counsel of Record
James S. Patrick, Jr.
Counsel of Record
June 2, 1976.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of July, 1976, I caused three true and correct printed copies of the foregoing to be deposited in United States Postal mailbox, with first class postage paid, and the same being addressed to the following, to wit:

Mr. R. A. Ashley, Jr., Esq.
Supreme Court Building
Nashville, Tn. 37219

Ms. Etrula R. Trotter, Esq.
Supreme Court Building
Nashville, Tn. 37219

Mr. George W. Hymers, Esq.
P. O. Box 2825
Jackson, Tn. 38301

Mrs. Jewell Redden, Clerk
Supreme Court of Tennessee
Jackson, Tn. 38301

Robert E. Lillard
Counsel for Petitioner
Stahlman Building
Nashville, Tn. 37201

APPENDIX

IN THE CIRCUIT COURT OF MADISON COUNTY, TENNESSEE

JAMES SANFORD BURNETTE,
Petitioner

No. 5

THE STATE OF TENNESSEE
and
THE STATE OF ALABAMA,
Respondents

Madison County

(Habeas Corpus)

PETITION FOR WRIT OF HABEAS CORPUS, to dismiss extradition warrant issued by the Governor of Tennessee ordering the Sheriff of Madison County, Tennessee, to turn the petitioner over to the State of Alabama.

Comes now your petitioner and for his cause of action states that:

He was convicted of the charge of obtaining money by false pretense in Talladega County, Alabama on the 22nd day of August, 1972, and that this conviction was affirmed by the Alabama Court of Appeals on the 14th day of August, 1973. That even though the authorities from Alabama and more particularly the District Attorney General of Talladega County knew the exact location of your petitioner the State of Alabama made no attempt whatsoever to have your petitioner removed to the State of Alabama to begin serving his sentence and therefore waived its right to have your petitioner extradited.

Your petitioner would also state and show to the Court that the petitioner is not a "fugitive from justice," since he does not meet the requirements for being a fugitive from justice.

Now in support of his petition, the petitioner would offer the following arguments, to-wit:

That the State of Alabama has waived jurisdiction or any further right or claim to the body of your petitioner, James Sanford Burnette, because under Title 18, Section 4085 U.S.C.A., The State of Alabama had the right to and should have asked the U.S. Attorney to return the petitioner to the State of Alabama after his Federal Conviction, but before he began serving his sentence on the Federal Charge since the Alabama sentence was imposed prior to the arrest on Federal Charges.

Your petitioner would further state unto this Honorable Court that he wrote both the Judge and the Attorney General of Talladega County, Alabama, asking them to have him returned to Alabama to begin serving the sentence imposed there; this they did not do.

Also, in the case of Lanier vs. Williams the Federal District Court of Oklahoma found that Oklahoma had waived any claim that it might have to have a person extradited where it had allowed one to leave that State and made no attempt for several years to have him returned to begin serving his sentence.

Your petitioner would show that The State of Alabama does not consider your petitioner to be a "fugitive from justice" because it has not preceeded to take a final forfeiture on your petitioner's bonding company. (See page 14 of transcript of testimony of Talladega County Attorney General.)

In conclusion, your petitioner would state and show unto this Court that the State of Alabama has failed to act with diligence to have your petitioner returned to Alabama in violation of his constitutional rights and has also failed to prove that your petitioner is a "fugitive from justice."

WHEREFORE, your petitioner prays that he be discharged immediately.

JAMES SANFORD BURNETTE, Petitioner

IN THE CRIMINAL COURT OF MADISON COUNTY, TENNESSEE

STATE OF TENNESSEE — No. 75-159N and No. 5 Madison County (Habeas Corpus)

vs.

JAMES S. BURNETT

ORDER

On July 2, 1975, a full hearing was held on the Extradition of the above named Defendant. Also a hearing was held on the Petition for Writ of Habeas Corpus, filed shortly after 3:00 p.m., July 2, 1975. Honorable Les Barham, appointed counsel, and Honorable James S. Patrick, Jr., retained counsel, represented the Defendant. District Attorney General George W. Hymers and Assistant District Attorney General Howard F. Douglass represented the State.

As to both the Extradition and Petition for Writ of Habeas Corpus, the Court considered both matters at the same time.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petition for Writ of Habeas Corpus be dismissed, and the Motion that the Defendant be released to the custody of Alabama Authorities, in accord with Honorable Ray Blanton's warrant of rendition, is approved. It is, therefore, the Order of this Court that James S. Burnett be delivered to the authorities of the State of Alabama for return to that Jurisdiction.

The Defendant is allowed 90 days in which to appeal, should this be desired.

Entered this the 3rd day of July, 1975.

/s/ Andrew T. Taylor

Approved for Entry:

/s/ George W. Halmers
DISTRICT ATTORNEY GENERAL
Copy:
Honorable Les Parham
Jackson State Bank Building
Jackson, Tennessee

Honorable James S. Patrick, Jr.
103 B Saunders Ferry Road
Hendersonville, Tennessee

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

JANUARY, 1976

APPEAL FROM THE CRIMINAL COURT OF MADISON COUNTY
HONORABLE ANDREW T. TAYLOR, JUDGE

JAMES SANFORD BURNETTE,

PLAINTIFF IN ERROR.

vs.

No. 5
MADISON COUNTY
(Habeas Corpus)

STATE OF TENNESSEE,

DEFENDANT IN ERROR.

FOR PLAINTIFF IN ERROR:	FOR DEFENDANT IN ERROR:
JAMES S. PATRICK Hendersonville, Tennessee	R. A. ASHLEY, JR. Attorney General Nashville, Tennessee
LESLIE BARHAM Jackson, Tennessee	ETRULA R. TROTTER Assistant Attorney General Nashville, Tennessee
	GEORGE W. HYMERS District Attorney General Jackson, Tennessee

JUDGMENT AFFIRMED

OPINION BY JUDGE GALBREATH

FILED: March 10, 1976

OPINION

Plaintiff in error or Appellant has timely filed this appeal from the denial by the Criminal Court of Madison County of his petition for habeas corpus.

Petitioner was tried and convicted of a crime in Alabama. While that conviction was being appealed in Alabama, petitioner, on bond, came to Tennessee where he was subsequently arrested, tried and convicted upon a federal charge. He was then sent to Terre Haute, Indiana to serve the sentence imposed upon the federal conviction. While petitioner was imprisoned in Indiana his Alabama conviction was affirmed. Authorities in Alabama learned where petitioner was and lodged a detainer against him, as did their counterparts in Tennessee. Upon release from the Indiana institution on parole petitioner elected to return to Tennessee. The Alabama authorities then caused to be issued a Governor's Warrant seeking extradition of Petitioner to Alabama for the serving of his sentence. Governor Blanton, in turn, signed a Governor's Warrant honoring that sent from Alabama and authorizing petitioner's detention and deliverance to authorities from Alabama. A hearing, as provided under T.C.A. 40-1020 to test the legality of the warrant held on May 2, 1975 in the Madison County Criminal Court was attended by petitioner, an attorney appointed the day before to assist him, the Madison County District Attorney General, and a District Attorney from Alabama who had instigated the attempt to return petitioner to Alabama. The hearing was continued following testimony of the Alabama District Attorney to allow petitioner time to confer with attorneys and to prepare and file a Petition for the Writ of Habeas Corpus as also provided under the provisions of T.C.A. 40-1020. At the continuation hearing petitioner testified and counsel for petitioner and the State argued. The trial judge stated:

> "All right, Gentlemen, what we have here is the State of Alabama has submitted that this man is wanted in the State of Alabama on a felony charge. The Gover-

nor of Alabama and the Governor of Tennessee have signed extradition papers."

"This Court has the responsibility of determining whether the Defendant present here is the man wanted in the State of Alabama, and he is."

"I realize his concern about some of these matters, and he may have a good defense in the State of Alabama, but the Court, this Court, is of the opinion that he should be released to the Alabama authorities, and I am so holding and it is so ordered. Prepare an order to that effect."

The basis of the principal assignment of error is that petitioner was not a fugitive since the authorities in the State of Alabama knew where he was. After release from the federal institution in Indiana petitioner, by refusing to return to the demanding State, became a fugitive from it. A case which arose under the law of the State prior to the passage of the Uniform Extradition Act now in effect considered a remarkably similar set of circumstances. See State ex rel Lea v. Brown, 166 Tenn. 669, 64 SW2d 841. It was there held that in a habeas corpus proceeding such as in that and this case, the only questions open for consideration are whether petitioner is charged with crime in the demanding state and is a fugitive from justice. It then went on to generally define "fugitive from justice" as "one who, being charged with crime in the demanding state, has fled therefrom." The Supreme Court held further in Lea that one who voluntarily appeared in the foreign state to answer criminal charges, was tried and conficted, released on bond pending appeal, left the foreign state and failed to appear upon affirmance of the conviction was indeed a fugitive from justice.

The identity of the petitioner as the person whose activities were adjudged a crime in the demanding state is admitted. Further arguments advanced on behalf of the petitioner to the effect that Alabama has waived its right to his custody and that the authorities of that State have violated his

right to an opportunity to have the sentence imposed in Alabama served concurrent to the subsequently imposed federal sentence are not supported by the record or any authorities cited.

The judgment of the trial court is affirmed. A pending contested motion to review bond is denied and petitioner will be held in custody by the Sheriff of Madison County until surrendered to the Alabama authorities; provided, however, if application is timely made to the Supreme Court for review by certiorari the defendant may be at liberty under $10,000.00 bail, pending the disposition of such application.

CHARLES GALBREATH, JUDGE

CONCUR:

MARK A. WALKER, JUDGE

MARTHA CRAIG DAUGHTREY, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES SANFORD BURNETTE,
Petitioner

vs MADISON COUNTY

STATE OF TENNESSEE,
Respondent

IN RE: PETITION FOR WRIT OF CERTIORARI OF JAMES SANFORD BURNETTE

Upon consideration of the petition and brief in support thereof of James Sanford Burnette, the reply brief of the State of Tennessee, the opinion of the Court of Criminal Appeals and the record in the cause,

Finding no error in the Court of Criminal Appeals the writ is denied at the cost of petitioner.

PER CURIAM

FILED: APRIL 26, 1976

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JAMES SANFORD BURNETTE,
Plaintiff in error

vs. No. 5
Madison County
STATE OF TENNESSEE, (Habeas Corpus)
Defendant in Error

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is herewith given that James Sanford Burnette, Plaintiff in Error above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Criminal Appeals of Tennessee filed March 10, 1976 and from which a Petition for Writ of Certiorari to the Supreme Court of Tennessee was denied on April 26, 1976.

This appeal is taken pursuant to United States Code Title 28, Section 1257 (3).

James S. Patrick, Attorney
for Plaintiff in Error

Patrick J. Kennedy, Attorney for Plaintiff in Error

CERTIFICATE OF SERVICE

I, Patrick J. Kennedy, hereby certify that a true and exact copy of the foregoing Notice of Appeal has been forwarded to R. A. Ashley, Jr., Attorney General for the State of Tennessee Supreme Court Building, Nashville, Tennessee 37219, Etrula R. Trotter, Assistant Attorney General for the State of Tennessee, Supreme Court Building, Nashville, Tennessee 37219, and George W. Hymers, District Attorney General for the State of Tennessee, P. O. Box 2825, Jackson, Tennessee 38301, on this the 20th day of May, 1976.

Patrick J. Kennedy

STATE OF TENNESSEE **AFFIDAVIT OF:**

COUNTY OF DAVIDSON **PATRICK J. KENNEDY**

Comes the affiant, Patrick J. Kennedy, and being first duly sworn deposes and states as follows:

1. That is is an attorney at law, licensed by the Supreme Court of the State of Tennessee to practice law in the State of Tennessee.

2. That this affidavit is given in compliance with Rule 33(3)(c) of the Rule of Procedure of the Supreme Court of the United States.

3. That on the 20th day of May, 1976, I did, in compliance with Rules 10, 11, and 33 of the Rules of Procedure of the Supreme Court of the United States, cause an exact copy of the hereto attached Notice of Appeal to be deposited in a United States Postal Mailbox, with First Class postage paid, and the same be addressed to the following Councils of Record or Court Clerks at the following Post Office addresses, to wit.

Mr. R. A. Ashley, Jr.
Atrorney General for the
State of Tennessee
Supreme Court Building
Nashville, TN 37219

Etrula R. Trotter
Assistant Attorney General
for the State of Tennessee
Supreme Court Building
Nashville, TN 37219

Mr. George W. Hymers
District Attorney General
for the State of Tennessee
P. O. Box 2825
Jackson, TN 38301

Mrs. Jewell Redden
Clerk of the Supreme Court of Tennessee
Jackson, TN 38301

4. Further, affiant saith not.

Patrick J. Kennedy

Sworn and subscribed before me
this 1st day of
July, 1976.

John E. Kennedy

Notary Public

My Commission Expires:
May 13, 1976

[Notary Seal]

Supreme Court, U. S.
FILED
AUG 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-26

JAMES SANFORD BURNETTE,
PETITIONER,

VS.

THE STATE OF TENNESSEE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON AND THE SUPREME COURT OF TENNESSEE

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION OF THE STATE OF ALABAMA, AMICUS CURIAE

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General of Alabama

Office Of The Attorney General
250 Administrative Building
64 No. Union Street
Montgomery, Alabama 36130

TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
TABLE OF COURT RULES	iv
THE INTEREST OF THE STATE OF ALABAMA, AMICUS CURIAE	1
STATEMENT OF THE CASE	2
QUESTION PRESENTED	3
ARGUMENT	3
CONCLUSION	8
CERTIFICATE OF SERVICE	10

TABLE OF CASES

Page

Ableman v. Booth,
21 How. 506, 62 U. S. 506, 16 L.Ed 169 (1859) 7

Albori v. United States,
(9th Cir., 1933) 67 F. 2d 4 4

Bassing v. Cady,
208 U. S. 386, 52 L.Ed 540, 28 S. Ct. 392 (1908) 7

Bilton v. Beto,
(5th Cir., 1968) 403 F. 2d 664 5

Buchalter v. New York,
319 U. S. 427, 87 L.Ed 1492, 67 S. Ct. 1716 (1943) 6

Burnette v. Holingsworth,
(E.D. Tenn) C. A. #1-76-10 3

Burnette v. State,
50 Ala. App. 630, 282 So. 2d 70 (1973) 2

Clifton v. Beto,
(5th Cir., 1969) 411 F. 2d 1226 5

Dorrough v. Texas,
(5th Cir., 1971) 440 F. 2d 1063 5

Drew v. Thaw,
235 U. S. 432, 59 L.Ed 302, 35 S. Ct. 137 (1914) 7

Foster v. Illinois,
329 U. S. 712, 91 L.Ed 619, 67 S. Ct. 1716 (1947) 6

Page

Hanks v. Wideman,
(5th Cir., 1970) 434 F. 2d 256 5

Holtzinger v. Estelle,
(5th Cir., 1974 488 F. 2d 517 6

Jennings In Re,
(Cir. Ct. E.D. Mo., 1902) 118 F. 479 4

Mills v. Beto,
(5th Cir., 1973) 477 F. 2d 124 5

Piper v. Estelle,
(5th Cir., 1973) 485 F. 2d 245 ..... 5, 6

Ponzi v. Fessenden,
258 U. S. 254, 66 L.Ed 607, 42 S. Ct. 309,
22 A. L. R. 879 (1922) 7

People v. Foster,
394 Ill. 194, 68 N.E. 2d 252 (1946) 6

Shields v. Beto,
(5th Cir., 1967) 307 F. 2d 1003 ..... 4, 5, 6

Smith v. Swope,
(9th Cir., 1937) 91 F. 2d 260 3

Thompson v. Bannan,
(6th Cir., 1962) 298 F. 2d 611 4

Weathers v. Henderson,
(5th Cir., 1973) 480 F. 2d 559 ..... 5, 7

White v. Pearlman,
(10th Cir., 1930) 42 F. 2d 788 4

TABLE OF COURT RULES

Page

Rule 42 (4), Rules of the Supreme Court of the United States 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-26

JAMES SANFORD BURNETTE,
PETITIONER,

VS.

THE STATE OF TENNESSEE,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION OF THE STATE OF ALABAMA, AMICUS CURIAE

THE INTEREST OF THE STATE OF ALABAMA, AMICUS CURIAE

The petitioner is presently under an unexecuted sentence rendered by an Alabama Court. Alabama is seeking to extradict the petitioner from Tennessee in order to execute its sentence. The petitioner is resisting extradition to Alabama by the instant litigation. The ultimate question is Alabama's right to enforce its sentence. Therefore, the State of Alabama is the real party in interest in these proceedings.

The State of Alabama has sought the consent of the petitioner to appear as an *amicus curiae* in these proceedings.

The petitioner has not, thus far, granted or denied his consent. The State of Alabama, therefore, is appearing, sponsored by its Attorney General, pursuant to Rule 42(4) of the Rules of this Honorable Court.

STATEMENT OF THE CASE

On August 22, 1972, the petitioner was convicted in the Circuit Court of Talladega County, Alabama, of obtaining money by false pretenses and sentenced to ten (10) years imprisonment. At the time of sentencing, the petitioner was advised of his right to appeal his conviction. The petitioner was specifically advised by the trial judge that if notice of appeal was given at the time of sentencing, he had the option under State law of having his sentence stayed pending appeal or of commencing his sentence immediately. The petitioner chose the former option, giving notice of appeal with suspension of sentence. Sentence was suspended and appeal bond was set at $12,000. Two days later, the appeal bond was reduced by the trial judge. On the same day the petitioner gave his appeal bond and was released thereunder. (Record in *Burnett v. State*, 50 Ala. App. 630, 282 So. 2d 70 [1973], pp. 149-153).

While his appeal from his Alabama conviction was pending, the petitioner was arrested by Federal authorities in Knoxville, Tennessee, on Federal charges. He was tried on those charges on December 12, 1972, convicted and sentenced on December 29, 1972, to the Federal penitentiary at Terre Haute, Indiana. On August 7, 1973, the petitioner entered the Federal penitentiary at Terre Haute. Seven (7) days later, on August 14, 1973, the Court of Criminal Appeals of Alabama affirmed the petitioner's Alabama conviction. (Petition, pp. 3-4 and *Burnette v. State*, 50 Ala. App. 630 282 So. 2d 70 [1973]).

On September 30, 1973, Alabama lodged a detainer against the petitioner with the Federal prison authorities. On February 18, 1975, the petitioner was released from the Federal penitentiary. At that time both Tennessee and Alabama had detainers on the petitioner. The petitioner waived extradition to Tennessee but refused to waive extradition to Alabama. He was taken into custody by Tennessee authorities. On May 12, 1975, Alabama began extradition procedures which the petitioner resisted and continues to resist. (Petition pp. 5-6).[1]

QUESTION PRESENTED

There are numerous procedural and Constitutional questions raised by this ligitation, however, in this brief the *amicus* will limit itself to the issue of the merits of the petitioner's ultimate claim. This issue is as follows:

What effect if any does a Federal conviction, sentence and execution of sentence have on a prior state sentence which was being appealed at the time of the Federal conviction and the convict was at large on appeal bond?

ARGUMENT

The petitioner claims that his Federal conviction, while he was at large on appeal bond, utterly canceled out his Alabama sentence. In support of this claim, he cites numerous cases, none in point.

Smith v. Swope, ([19th Cir., 1937] 91 F. 2d 260), and

---

[1]In addition to his habeas corpus litigation in the Tennessee State Courts, the petitioner also filed a habeas corpus petition in the U.S. District Court for the Eastern District of Tennessee. This petition was dismissed on March 12, 1976. **Burnette v. Hollingsworth** (E. D. Tenn.) C. A. #1-76-10.

the cases cited therein[2] all conserned the running of Federal sentences under Federal law, and all addressed the question of the effect of an *improper* release of the convict by a Federal official to another jurisdiction. In each case the release was over the prisoner's objection. In no case did the court hold that the improper release invalidated the sentence, as the petitioner claims, but only that the sentence continued the run. See in particular *White v. Pearlman,* (10th Cir., 1930) 42 F. 2d 788. In the Petitioner's case the sentence at issue is a State sentence controlled by State law. Alabama did not release the petitioner to the Federal authorities[3] but enlarged him on appeal bond on his motion and at his request. This was proper under long established State law. The petitioner could have commenced his sentence pending appeal but chose not to do so.

The amicus curiae does not know why *Thompson v. Bannan,* ([6th Cir., 1962] 298 F. 2d 611)is cited by the petitioner. It certainly does not stand for the proposition for which it is cited. Conceivably, it is cited by mistake.

Shields v. Beto, ([5th Cir., 1967] 370 F. 2d 1003) comes closer than any case to supporting the petitioner's claims, but it is still miles wide of the mark. In *Shields* the State of Texas released a convict with a forty-year sentence to another State. Texas placed no detainer against the convict and made no effort at all to obtain custody of him for the next twenty-eight (28) years. On the occasion of the convict's being sentenced for another offense, a Texas trial

---

[2]These include **Albori v. United States,** (9th Cir. 1933) 67 F. 2d. 4; **White v. Pearlman,** (10th Cir., 1930) 42 F. 2d 788, and **In Re Jennings,** (Cir. Ct. E.D. Mo, 1902) 118 F. 479.

[3]As will be discussed below, if Alabama has released the petitioner to Federal authorities for trial and execution of his Federal sentence, the effect would have been the same. See page 5.

court ordered the forty-year sentence recommenced. The Fifth Circuit held that the Texas trial court had no jurisdiction to reinstate the old sentence. Whatever else may be be said about *Shields,* it is no doubt *sui generis.* No other Circuit has cited it, and the Fifth Circuit has limited the rule to its own peculair facts. The *Shields* rule applies only where: (1) the State turns the convict over to another jurisdiction and (2) thereafter indicates no interest in him whatsoever for (3) a long time. The prisoner must be turned over by the State, release on parole is not enough *Clifton v. Beto,* [5th Cir., 1969] 411 F. 2d 1226), but merely turning a prisoner over to another jurisdiction has no effect on the State sentence. *Dorrough v. Texas,* (5th Cir., 1971) 440 F. 2d 1063; *Mills v. Beto,* [illegible]h Cir., 1973) 477 F. 2d 124; *Weathers v. Henderson,* (5th Cir., 1973) 480 F. 2d 559; *Bilton v. Beto,* (5th Cir., 1968) 403 F. 2d 664. Even an erroneous transfer has no effect (*Hanks v. Wideman,* [5th Cir., 1970] 434 F. 2d 256) nor, does a lack of vigorous pursuit of the convict affect a sentence. In *Piper v. Estelle,* ([5th Cir., 1973] 485 F. 2d 245) the Court discussed *Shields* in these terms:

> "Shields v. Beto was not intended to constitute a trap for unwary state officials. It is founded upon the due process clause of the Fourteenth Amendment and requires that 'action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice, Shields at 1004. The facts in Shields are not at all analogous to those in the case at bar. Before expiration of the Texas sentence he was then serving, Shields had been extradited to Louisiana to complete a jail term. Texas filed no detainer, and Shields was ultimately released on parole in Louisiana. Eighteen years after his release and 28 years after his extradition to Louis-

iana, Texas sought to compel Shields to serve the remainder of his Texas sentence. We held that under these circumstances Texas had demonstrated such a lack of interest in Shields as to waive jurisdiction over him.

"In cases based upon the principles of Shields it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest. Rather the waiving state's action must be so affirmatively wrong or its inaction so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in the aftermath of such action or inaction." 485 F. 2d 245, 246.

Comparing the petitioners case to *Shields* makes it difficult to avoid one further quotation from *Piper;* to-wit: "Any claim that . . . [the State's conduct in this] . . . constituted a lack of interest of the dimensions present in *Shields* is ridiculous." 485 F. 2d 245, 246. See, also *Holtzinger v. Estelle,* (5th Cir., 1974) 488 F. 2d 517.

The petitioner cites *Buchalter v. New York,* (319 U.S. 427, 87 L.Ed 1492, 67 S. Ct. 1716 [1943] for the proposition that the States must enforce criminal laws in accordance with due process, which is certainly true.[4] How did the State of Alabama violate due process? By allowing the petitioner an appeal bond? By allowing him under such

[4]This Honorable Court found no violation in **Buchalter.** The petitioner also cites **Foster v. Illinois,** (329 U.S. 712, 91 L.Ed. 618, 67 S. Ct. 1716 [1947]). **Foster** was an order denying certiorari sought to review **People v. Foster,** (394 Ill. 194, 68 NE 2d 252 [1946]), which is not in point.

bond to leave the State? Why a fugitive left a State is not relevant in extradiction proceedings. *Drew v. Thaw,* 235 U.S. 432, 59 L.Ed 302, 35 S. Ct. 137 (1914). Even where one leaves a State with the knowledge and consent of State officials, he is subject to extradition. *Bassing v. Cady,* 208 U.S. 386, 52 L.Ed 540, 28 S. Ct. 392 (1908). The petitioner claims that Alabama could have done more to obtain custody of him from the Federal Government. To be sure Alabama did not attempt to obtain custody from the Federal Government by physical force, such would have been unconstitutional. *Ableman v. Booth,* 21 How. 506, 62 U. S. 506, 16 L. Ed. 169 (1859). The question of the custody of persons who are under sentence in one jurisdiction and wanted for trial or execution of sentence in another is one of comity between sovereigns which the prisoner has no standing to raise. *Ponzi v. Fessenden,* 258 U. S. 254, 66 L.Ed. 607, 42 S. Ct. 309, 22 ALR 879 (1922); *Weathers v. Henderson* (5th Cir., 1973) 480 F. 2d 559.

In placing its detainer against the petitioner, the State of Alabama did all it could do to execute its sentence until the petitioner was released from Federal custody. Throughout the period from the petitioner's conviction and including the present, Alabama's officials have endeavored to execute the petitioner's sentence. These efforts in chronological order included: an appeal bond, a detainer filed with the Federal prison, extradition procedures, forfeiture of the appeal bond when the petitioner failed to appear following his release from the Federal prison, resisting the petitioner's Federal habeas corpus petition and this brief. The only reason Alabama has not done more is because there is no more to do.

One final word about the petitioner's four "Reasons

For Granting This Writ." (Petition p. 9). Reason Number 3 reads as follows:

"Three

> "The Petitioner will suffer irreparable harm and injury if this Petition is not granted, in that he will be forced into a penitentiary in the State of Alabama and will thus be effectively denied access to this or any other court."

This statement should come as some surprise to the State and Federal Courts which sit in the State of Alabama, the United States Court of Appeals for the Fifth Circuit and this Honorable Court. Alabama prisoners file a veritable blizzard of writs everyday is various Courts.

CONCLUSION

In conclusion the State of Alabama, *amicus curiae*, respectfully submits the following:

1. The petitioner's claim is frivolous.

2. The petitioner's habeas corpus action in the courts of the State of Tennessee represents nought but an effort to delay the lawful execution of the sentence lawfully rendered against him by the Circuit Court of Talladega County, Alabama.

3. The instant petition represents a further effort on the part of the petitioner to further delay the execution of his sentence.

4. The judgment and decisions of the Honorable Courts of the State of Tennessee are patiently correct.

5. The writ is due to be denied.

Therefore, the State of Alabama, *amicus curiae* respectfully prays that the writ be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

JOSEPH G. L. MARSTON, III
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, *amicus curiae,* in the above-styled cause do hereby certify that on this —— day of ————————, 1976, I did serve the requisite number of copies of the foregoing Brief and Argument on the attorneys for the parties by mailing said copies to them, first class postage prepaid and addressed as follows:

Mr. Robert E. Lillard, Esq.
Attorney at Law
Stahlman Building
Nashville, Tennessee 37201

Mr. Patrick J. Kennedy, Esq.
Attorney at Law
209 Public Square, North
Nashville, Tennessee 37201

Mr. James S. Patrick, Esq.
Attorney at Law
204 Public Square, North
Nashville, Tennessee 37201

Honorable R. A. Ashley, Jr.
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Honoroble Etrala R. Trotter
Assistant Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Honorable George W. Hymers
District Attorney General of Tennessee
P.O. Box 2825
Jackson, Tennessee 38301

JOSEPH G. L. MARSTON, III
Assistant Attorney General
of Alabama

Address of Counsel:

Office of the Attorney General
250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama, 36104